No. 85-588 (9)

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, ET AL., PETITIONERS

v.

ROBERT B. ELLIOTT

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING RESPONDENT

CHARLES FRIED
Solicitor General

CAROLYN B. KUHL
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHNNY J. BUTLER
General Counsel (Acting)

GWENDOLYN YOUNG REAMS
Associate General Counsel (Acting)

VELLA M. FINK
Assistant General Counsel

MARK S. FLYNN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

38pp

QUESTION PRESENTED

This brief will address the following question:

Whether a federal court adjudicating a Title VII action must give preclusive effect to a judicially unreviewed decision of a state administrative agency finding no employment discrimination.

TABLE OF CONTENTS

	Page
Interest Of The Equal Employment Opportunity Commission	1
Statement	2
Summary of argument	5
Argument:	
A federal court adjudicating a Title VII action should not give res judicata effect to a judicially unreviewed decision of a state administrative agency	8
I. The full faith and credit statute does not require federal courts to give judicially unreviewed state administrative decisions res judicata effect	8
II. A judicially fashioned rule giving res judicata effect to state administrative decisions would be inconsistent with Title VII	13
III. This Court has previously denied res judicata effect to non-judicial decisions in Title VII actions	22
IV. Petitioners' suggested policy rationale for preclusion should not be substituted for Title VII's own requirements and policies	25
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36....7, 19, 23, 24, 25, 26, 27
American Tobacco Co. v. *Patterson*, 456 U.S. 63.... 11
Batiste v. *Furnco Construction Corp.*, 503 F.2d 447, cert. denied, 420 U.S. 928 ..... 15, 21
Board of Governors v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986) 11

Cases—Continued: Page

Bottini v. *Sadore Management Corp.*, 764 F.2d 116 15
Bowen v. *United States*, 570 F.2d 1311 18
Buckhalter v. *Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842, petition for cert. pending, No. 85-6094 (filed Dec. 23, 1985) 12, 16, 21
Burney v. *Polk Community College*, 728 F.2d 1374.. 12, 15, 21
Chandler v. *Roudebush*, 425 U.S. 840....7, 19, 22, 23, 25, 27
Chatelain v. *Mount Sinai Hospital*, 580 F. Supp. 1414 12
Clinton v. *Georgia Ports Authority*, 37 Fair. Empl. Prac. Cas. (BNA) 593 15-16
Cooper v. *Philip Morris, Inc.*, 464 F.2d 9 ..... 15, 21
Davis v. *Davis*, 305 U.S. 32 9
Delamater v. *Schweiker*, 721 F.2d 50 18
Gargiul v. *Tompkins*, 704 F.2d 661 12
Garner v. *Giarrusso*, 571 F.2d 1330 ..... 15, 20, 21
Gulf Oil Corp. v. *FPC*, 563 F.2d 588, cert. denied, 434 U.S. 1062 18
Heath v. *John Morrell & Co.*, 768 F.2d 245 ..... 15, 21
Holley v. *Seminole County School District*, 763 F.2d 399 12
King v. *City of Pagedale*, 573 F. Supp. 309 12
Kremer v. *Chemical Construction Corp.*, 456 U.S. 461 ..... *passim*
Magnolia Petroleum Co. v. *Hunt*, 320 U.S. 430..... 11, 12
McCulloch Interstate Gas Corp. v. *FPC*, 536 F.2d 910 18
McDonald v. *City of West Branch*, 466 U.S. 284..9, 11, 13
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792.... 7, 24
Migra v. *Warren City School District Board of Education*, 465 U.S. 75 ..... 4, 9
Mills v. *Duryee*, 11 U.S. (7 Cranch) 481 9
Mitchell v. *Bendix Corp.*, 603 F. Supp. 920 15
Mitchell v. *National Broadcasting Co.*, 553 F.2d 265 12
Mohasco Corp. v. *Silver*, 447 U.S. 807 14
Moore v. *Bonner*, 695 F.2d 799 ..... 12, 16, 26
New York Gaslight Club, Inc. v. *Carey*, 447 U.S. 54 26

Cases—Continued: Page

O'Hara v. *Board of Education*, 590 F. Supp. 696, aff'd mem., 760 F.2d 259 12
Pacific Seafarers, Inc. v. *Pacific Far East Line, Inc.*, 404 F.2d 804, cert. denied, 393 U.S. 1093.... 18
Painters District Council No. 38 v. *Edgewood Contracting Co.*, 416 F.2d 1081 18
Parker v. *Danville Metal Stamping Co.*, 603 F. Supp. 182 15
Parker v. *National Corporation for Housing Partnerships*, 619 F. Supp. 1061, appeal docketed, No. 85-5985 (D.C. Cir. Oct. 4, 1985) 12, 16
Parsons Steel Co. v. *First Alabama Bank*, No. 84-1616 (Jan. 27, 1986) 9
Pettus v. *American Airlines, Inc.*, 587 F.2d 627, cert. denied, 444 U.S. 883 19
Pizzuto v. *Perdue, Inc.*, 623 F. Supp. 1167 15
Reedy v. *State of Florida, Dep't of Education*, 605 F. Supp. 172 15
Rosenfeld v. *Department of Army*, 769 F.2d 237.... 19
Ross v. *Communications Satellite Corp.*, 759 F.2d 355 21
Thomas v. *Washington Gas Light Co.*, 448 U.S. 261 12
United Farm Workers v. *Arizona Agricultural Employment Relations Board*, 669 F.2d 1249.... 19
United States v. *Karlen*, 645 F.2d 635 18
United States v. *Locke*, No. 83-1394 (Apr. 1, 1985) 11
United States v. *Utah Construction & Mining Co.*, 384 U.S. 394 ..... 4-5, 16, 17, 18, 19, 20
Voutsis v. *Union Carbide Corp.*, 452 F.2d 889, cert. denied, 406 U.S. 918 15
Zanghi v. *Incorporated Village of Old Brookville*, 752 F.2d 42 12
Zywicki v. *Moxness Products, Inc.*, 37 Fair Empl. Prac Cas. (BNA) 710 16

Constitution, statutes and regulations:

U.S. Const. Art. IV, § 1 (Full Faith and Credit Clause) 8, 9
Act of May 26, 1790, ch. XI, 1 Stat. 122 *et seq.* 11

Constitution, statutes and regulations—Continued: Page

Act of Mar. 27, 1804, ch. 56, 2 Stat. 298 *et seq.* 11
Act of June 25, 1948, ch. 646, § 1738, 62 Stat. 947.. 11
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 1, 2
§ 706(b), 42 U.S.C. 2000e-5(b) 1, 6, 13, 20
§ 706(c), 42 U.S.C. 2000e-5(c) 6, 10, 13
§ 706(f), 42 U.S.C. 2000e-5(f) 13
§ 709(b), 42 U.S.C. 2000e-8(b) 26
Tucker Act, 28 U.S.C. (1964 ed.) 1346(2) 16
Wunderlich Act, 41 U.S.C. 321 ..... 16, 17
28 U.S.C. 1738 ..... 5, 6, 9, 10, 11, 12
42 U.S.C. 1981 ..... 2, 5
42 U.S.C. 1983 ..... 2, 15, 16
42 U.S.C. 1985 ..... 2, 5
42 U.S.C. 1986 ..... 2, 5
42 U.S.C. 1988 ..... 2, 5
Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-101 *et seq.* (1985).. 2
§ 4-5-301 3
§ 4-5-315 3
§ 4-5-322 3
29 C.F.R.:
Section 1601.13 26
Section 1601.21(e) 13
Section 1601.76 13
Section 1601.77 13
Section 1601.80 26

Miscellaneous:

Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith & Credit*, 58 Ind. L.J. 59 (1982) 11
Catania, *Access to the Federal Courts for Title VII Claimants in the Post-Kremer Era: Keeping the Doors Open*, 16 Loy. L.J. 209 (1985) 19-20
110 Cong. Rec. (1964):
p. 7205 27
p. 7214 27

Miscellaneous—Continued: Page

4 K. Davis, *Administrative Law Treatise* (1983).. 11, 19
E.E.O.C. Compl. Man. (CCH) (May 1985) 26
E.E.O.C. Dec. No. 86-4 (Dec. 6, 1985) 16
H.R. Rep. 92-238, 92d Cong., 1st Sess. (1971)..... 23, 24
Note, *Res Judicata Effects of State Agency Decisions in Title VII Actions*, 70 Cornell L. Rev. 695 (1985) 20
Restatement (Second) of Judgments (1982)..... 19
S. Rep. 92-415, 92d Cong., 1st Sess. (1971) 23, 27
Symposium, *Tennessee Administrative Law*, 13 Mem. St. U.L. Rev. 461 (1983) 2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-588

THE UNIVERSITY OF TENNESSEE, ET AL., PETITIONERS

v.

ROBERT B. ELLIOTT

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (EEOC) is the federal agency primarily responsible for administering federal fair employment statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Among other responsibilities, it reviews employment discrimination determinations by state fair employment practice (FEP) agencies in accordance with Section 706(b) of Title VII. 42 U.S.C. 2000e-5(b). The EEOC believes that petitioners' position in this case—urging that in adjudicating Title VII actions federal courts must give res judicata effect to judicially unreviewed state agency

decisions—is inconsistent with Title VII, could undermine private enforcement, and would interfere with the EEOC's exercise of its statutory responsibilities.[1]

STATEMENT

1. On December 18, 1981, petitioner University of Tennessee notified respondent, a black employee of the University's Agricultural Extension Service, that he would be discharged for inadequate job performance and misconduct. Respondent filed an appeal of the termination decision under the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-101 *et seq.* (1985), which provides a public employee with an administrative review of his proposed discharge. Shortly thereafter, respondent filed suit against petitioners in the United States District Court for the Western District of Tennessee, alleging that the proposed termination was racially motivated and therefore violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Respondent also raised federal civil rights claims under 42 U.S.C. 1981, 1983, 1985, 1986 and 1988. The district court stayed the federal action pending completion of respondent's state administrative challenge to the dismissal. See Pet. App. A1-A4.

An administrative law judge (ALJ) conducted the state administrative proceeding.[2] The ALJ dis-

[1] The EEOC takes no position on the preclusive effect of state administrative agency decision in suits brought under 42 U.S.C. 1981, 1983, 1985, 1986 and 1988.

[2] The state administrative review process is described by the court of appeals (Pet. App. A4-A5). See generally Symposium, *Tennessee Administrative Law,* 13 Mem. St. U. L. Rev. 461 (1983). It provides the basic elements of an adjudicative procedure, including right to counsel, right to request issuance of subpoenas and the right to examine and cross-examine witnesses on the record. Under Tennessee law, the ALJ must be an employee of either the affected state agency or the secretary of state. See Tenn. Code Ann. § 4-5-301 (1985).

claimed jurisdiction to adjudicate respondent's affirmative claim for violation of his civil rights. However, the ALJ concluded that he could consider respondent's allegations of employment discrimination as an affirmative defense to the University's charges of inadequate job performance and misconduct (Pet. App. A44-A45). After a lengthy hearing, the ALJ sustained four of the University's eight claims of improper and inadequate performance (*id.* at A166-A170), ruling further that respondent "failed in his burden of proof to the claim of racial discrimination as a defense to the charges against him" (*id.* at A177). The ALJ concluded, however, that respondent should be transferred rather than discharged (*id.* at A177-A182).

Respondent, in accordance with Tennessee law, requested review of the ALJ decision by the appropriate University of Tennessee official. See Tenn. Code Ann. § 4-5-315 (1985). That official, the Vice President for Agriculture, sustained the ALJ's ruling (Pet. App. A33-A35). Neither petitioners nor respondent exercised their statutory right under Tenn. Code Ann. § 4-5-322 (1985) to seek state court review (Pet. App. A6).

2. Following the state administrative decision, respondent renewed his federal court action. Petitioners then moved for summary judgment, arguing, inter alia, that under res judicata principles the state administrative finding of no discrimination precluded respondent's Title VII claims. The district court granted petitioners' motion, concluding that the ad-

ministrative finding should be given preclusive effect (Pet. App. A26-A32).[3]

The court of appeals reversed, holding that res judicata principles did not bar respondent's Title VII action. It relied upon this Court's decision in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982), which "drew a sharp distinction between state court judgments, which are entitled to deference under the res judicata principles of [28 U.S.C.] 1738, and unreviewed state administrative determinations which are not." Pet. App. A11. The court of appeals rejected petitioners' contention that *Kremer*'s statements concerning the nonpreclusive effect of state administrative decisions applied only to agencies with investigative, rather than adjudicative, authority, noting that *Kremer*'s statements were accompanied by citations to decisions involving state adjudicative agencies (*id.* at A12).

The court of appeals also rejected petitioners' contention that *Kremer*, by citing *United States* v. *Utah*

[3] The preclusive effects of former adjudication "are referred to collectively by most commentators as the doctrine of 'res judicata,'" which itself is often analyzed by reference to two concepts: claim preclusion and issue preclusion. *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75, 77 n.1 (1984). "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Ibid.* "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Ibid.* In this case, petitioners urge that issue preclusion should result from the agency's finding of no discrimination. Pet. Br. 26-27 n.11. In arguing that judicially unreviewed state administrative decisions should have no preclusive effect in Title VII actions, we use the more general terms "preclusive effect" and "res judicata" throughout this brief.

Construction & Mining Co., 384 U.S. 394 (1966), implicitly recognized that res judicata principles should be applied to administrative agencies. The court observed that *Kremer*'s sole reference to that case occurred in the course of examining the adequacy, for due process purposes, of New York's judicial review procedures (Pet. App. A12-A13). The court stated that "[t]he district court's holding that [respondent's] Title VII claim is barred by res judicata must fall in light of the unambiguous principle enunciated in *Kremer*" (*id.* at A13).[4]

SUMMARY OF ARGUMENT

This Court held in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982), that the full faith and credit statute, 28 U.S.C. 1738, requires that a federal court adjudicating a Title VII action give preclusive effect to a state court judgment affirming a state administrative agency's rejection of an employment discrimination claim. However, the Court also stated that federal court resolution of a Title VII claim is not precluded by unreviewed administrative decisions "even if such a decision were to be

[4] The court of appeals also held that the administrative decision should not preclude respondent's claims under 42 U.S.C. 1983, and by analogy, his claims under Sections 1981, 1985, 1986, and 1988. The court concluded that the full faith and credit statute, 28 U.S.C. 1738, applies only to state court judgments (Pet. App. A16) and that, therefore, the appropriate inquiry in this case was whether the federal courts should create a federal common law rule according preclusive effect to unreviewed administrative determinations when adjudicating Section 1983 actions (Pet. App. A17). The court held that the underlying policies of Section 1983 counselled against giving state administrative determinations preclusive effect (*id.* A19-A22).

accorded preclusive effect in a State's own courts" (456 U.S. at 470 n.7). *Kremer*'s reasoning controls the present case. The federal courts may consider respondent's Title VII claim, notwithstanding a prior state administrative determination, unreviewed by the state courts, that petitioner did not engage in employment discrimination.

Under *Kremer*, a federal court adjudicating a Title VII claim must give the same preclusive effect to a state court determination of employment discrimination that the determination would receive in the state's own courts. But as *Kremer* implicitly recognized, the full faith and credit statute governs only the res judicata effect of "judicial proceedings of any court" (28 U.S.C. 1738). It does not control the res judicata effect of a state administrative decision that received no review from the state's judiciary.

As *Kremer* also recognized, Title VII, in both its structure and purpose, cannot be squared with a rule giving preclusive effect to state administrative determinations. Section 706(c) of Title VII clearly contemplates that the EEOC will often defer its examination of a Title VII claim pending the state's fair employment practice (FEP) agency consideration of the dispute. See 42 U.S.C. 2000e-5(c). And Section 706(b) specifies that EEOC shall accord "substantial weight"—not preclusive effect—to the FEP agency decision. 42 U.S.C. 2000e-5(b). "EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions." *Kremer*, 456 U.S. at 470 n.7.

Petitioners concede that state FEP agency determinations may be nonpreclusive, but suggest that

preclusive effect should nevertheless be given to determinations by other state agencies that, in the course of their administrative proceedings, address employment discrimination claims. However, *Kremer* drew no such distinction. The opinion specifically cites court of appeals decisions involving both FEP and non-FEP agencies to illustrate the nonpreclusive effect of state administrative determinations. Certainly, Congress did not intend that the federal courts, in implementing the important national policy of non-discrimination, would be bound by findings of various state non-FEP agencies with little or no expertise in employment discrimination matters.

Indeed, this Court's decisions have repeatedly recognized that federal courts may give de novo consideration to Title VII claims notwithstanding prior non-judicial decisions rejecting discrimination claims. See *Chandler* v. *Roudebush*, 425 U.S. 840 (1976); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). For example, the Court held in *Chandler* that a federal court may adjudicate a federal employee's Title VII claim, notwithstanding the employing agency's prior administrative decision rejecting the employee's discrimination claim. Similar principles should control the Title VII claims of non-federal employees, including state and local employees who contest their discharge through state administrative procedures that result in incidental adjudication of employment discrimination claims.

Policy considerations also argue against application of "administrative res judicata" in the Title VII context. If state agency determinations of employment discrimination are given preclusive effect, claimants may choose to forego altogether state ad-

ministrative procedures protecting important rights. This result would weaken state administrative systems, diminish state participation in employment discrimination issues, and harm the federal-state cooperation achieved by worksharing agreements between EEOC and FEP agencies. Furthermore, it would increase the workload of the federal courts and the EEOC. The potential inefficiencies in nonpreclusion are easily exaggerated. Claimants who have lost their discrimination claims after a full hearing before a state agency are likely to be circumspect in seeking a full-scale federal adjudication. Furthermore, federal review, when it does occur, should be able to be conducted more expeditiously after an administrative proceeding. The issues generally have been narrowed, the need for discovery should be lessened, and the administrative record may be admitted as evidence entitled to appropriate weight.

ARGUMENT

A FEDERAL COURT ADJUDICATING A TITLE VII ACTION SHOULD NOT GIVE RES JUDICATA EFFECT TO A JUDICIALLY UNREVIEWED DECISION OF A STATE ADMINISTRATIVE AGENCY

I. The Full Faith and Credit Statute Does Not Require Federal Courts to Give Judicially Unreviewed State Administrative Decisions Res Judicata Effect

The Full Faith and Credit Clause empowers Congress to determine whether federal courts shall be bound by state judicial proceedings.[5] Congress, in

[5] The Full Faith and Credit Clause provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. Art. IV, § 1. Congress, of course, is under no obligation to give state proceedings binding effect in the federal courts. See *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 483 n.24 (1982); *Davis* v. *Davis*, 305 U.S. 32, 40 (1938).

turn, has enacted the full faith and credit statute, 28 U.S.C. 1738, which entitles the "judicial proceedings of any court of any such State" to "full faith and credit" in the federal courts.[6] Section 1738 requires "federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment." *McDonald* v. *City of West Branch*, 466 U.S. 284, 287 (1984). Congress, through the full faith and credit statute, has thus expressed a general federal respect for state court decisions.[7]

This Court concluded in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982), that Congress

[6] Section 1738 provides in pertinent part:

> The records and judicial proceedings of any court of any such State, Territory or Possession * * * shall be proved or admitted in other courts within the United States and its Territories and Possessions [upon proper authentication].
>
> Such * * * records and judicial proceedings * * * shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[7] See, *e.g.*, *Parsons Steel Co.* v. *First Alabama Bank*, No. 84-1616 (Jan. 27, 1986), slip op. 5; *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75, 81 (1984); *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 462-463, 466 n.6 (1982); *Davis* v. *Davis*, 305 U.S. 32, 40 (1938); *Mills* v. *Duryee*, 11 U.S. (7 Cranch) 481 (1813).

intended that federal courts adjudicating Title VII actions would give preclusive effect to state court judgments affirming state administrative agency determinations of employment discrimination claims.[8] The Court determined that Title VII did not contain an express or implied repeal of Section 1738's requirement that "all United States courts afford the same full faith and credit to state court judgments that would apply in the State's own courts." *Kremer*, 456 U.S. at 462-463. It found no "manifest incompatibility between Title VII and § 1738" that would demonstrate Congress's intention "to override the historic respect that federal courts accord state court judgments." 456 U.S. at 470-472.

The issue in the present case is whether federal courts adjudicating Title VII actions must give preclusive effect to *judicially unreviewed* state administrative determinations of employment discrimination claims. The full faith and credit statute has no application in this context. Section 1738, by its express terms, applies only to the "judicial proceedings of any court." 28 U.S. 1738. Congress, by its plain language, has given preclusive effect only to

[8] The petitioner in *Kremer* had filed a religious discrimination charge with the New York State Division of Human Rights, a recognized state FEP agency entitled to deferral under Section 706(c), 42 U.S.C. 2000e-5(c). The agency determined that there was no probable cause to believe that the petitioner's employer had engaged in religious discrimination in violation of New York's employment discrimination statute. 456 U.S. at 464. The petitioner then sought judicial review, and the New York state courts affirmed the state agency's decision. *Ibid.* This Court concluded that the state court's affirmance of the state agency's decision precluded petitioner from raising an identical Title VII claim of religious discrimination.

state court judgments; Section 1738 does not extend that effect to state administrative decisions.

The reference to "any court" is express and unambiguous; there is little need to peer behind those words and into the legislative history. See *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 11; *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982). In all events, the legislative history confirms that the term "any court" refers to traditional courts rather than administrative bodies.[9] This Court has never held that Section 1738 requires that federal courts give res judicata effect to state administrative determinations.[10] Moreover, the lower fed-

[9] The full faith and credit statute was first enacted in 1790. See Act of May 26, 1790, ch. XI, 1 Stat. 122 *et seq.*, and the subsequent amendments have been minor; see Act of Mar. 27, 1804, ch. 56, 2 Stat. 298 *et seq.*; Act of June 25, 1948, ch. 646, § 1738, 62 Stat. 947. See generally Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith & Credit*, 58 Ind. L.J. 59, 66 n.36 (1982). Notably, Congress chose the operative words "any court" nearly 200 years ago, long before the appearance of administrative agencies and notions of administrative res judicata. See 4 K. Davis, *Administrative Law Treatise* § 21.2 (1983). It is, of course, immaterial that there are now state administrative bodies that conduct quasi-judicial activities; the scope of Section 1738 is controlled by the intent of Congress at the time of the statute's enactment. See *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986).

[10] This Court *has* held that Section 1738 does *not* apply to collective bargaining arbitration because that dispute resolution mechanism "is not a 'judicial proceeding.'" *McDonald*, 466 U.S. at 288. Petitioners suggest (Pet. Br. 23-24) that Section 1738 should apply to state administrative proceedings, quoting dicta from the plurality in *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 443 (1943). The quoted statement, an ambiguous passage from a subsequently criticized decision

eral courts generally have agreed that Section 1738 does not confer preclusive effect on state administrative decisions.[11]

Thus, it is clear that the full faith and credit statute, which held controlling importance in *Kremer*, has no application in this case.

---

concerning the obligation among the states to give full faith and credit to state workmen's compensation programs, has no controlling force in this case. See *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 280-286 (1980) (plurality opinion) (suggesting that *Magnolia Petroleum* should be overruled).

[11] Although the Sixth Circuit and the Seventh Circuit disagree whether federal courts adjudicating Title VII actions should give preclusive effect to judicially unreviewed administrative decisions, they do agree that Section 1738 cannot resolve the issue. See Pet. App. A16; *Buckhalter* v. *Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842, 849 (7th Cir. 1985), petition for cert. pending, No. 85-6094 (filed Dec. 23, 1985). Other courts have either suggested or concluded that Section 1738 does not apply to administrative determinations. See, *e.g.*, *Holley* v. *Seminole County School District*, 763 F.2d 399, 400 (11th Cir. 1985); *Burney* v. *Polk Community College*, 728 F.2d 1374, 1380 (11th Cir. 1984); *Gargiul* v. *Tompkins*, 704 F.2d 661, 666-667 (2d Cir. 1983); *Moore* v. *Bonner*, 695 F.2d 799, 800-801 (4th Cir. 1982); *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265, 276 (2d Cir. 1977); *Parker* v. *National Corporation for Housing Partnerships*, 619 F. Supp. 1061, 1064-1065 (D.D.C. 1985), appeal docketed, No. 85-5985 (D.C. Cir. Oct. 4, 1985); *Chatelain* v. *Mount Sinai Hospital*, 580 F. Supp. 1414, 1417 (S.D.N.Y. 1984); *King* v. *City of Pagedale*, 573 F. Supp. 309, 313 (E.D. Mo. 1983). Although several courts have reached a contrary conclusion, their analysis of Section 1738 is summary and does not withstand close scrutiny. See *Zanghi* v. *Incorporated Village of Old Brookville*, 752 F.2d 42, 46 (2d Cir. 1985); *O'Hara* v. *Board of Education*, 590 F. Supp. 696, 701 (D.N.J. 1984), aff'd mem., 760 F.2d 259 (3d Cir. 1985).

II. A Judicially Fashioned Rule Giving Res Judicata Effect to State Administrative Decisions Would Be Inconsistent With Title VII

Since Congress has not required federal courts to give full faith and credit to state administrative decisions, "any rule of preclusion would necessarily be judicially fashioned." *McDonald*, 466 U.S. at 288. But judicial creation of such a rule in Title VII cases would conflict with the language and structure of Title VII and would be inconsistent with this Court's past interpretation of that statute.

Title VII plainly contemplates that state administrative proceedings will be used both as an initial enforcement mechanism and as a means of achieving non-judicial conciliation of Title VII disputes. Section 706(c) of Title VII gives states and localities that have enacted equal employment legislation a period of up to 60 days to attempt resolution of discrimination claims arising within their boundaries. 42 U.S.C. 2000e-5(c). Section 706(b) provides that if the employee is dissatisfied with the state FEP agency's resolution of his claim, he may request the EEOC to make an independent reasonable cause determination. 42 U.S.C. 2000e-5(b). Section 706(b) further specifies that EEOC shall accord "substantial weight"—not preclusive effect—to the FEP agency decision. *Ibid.*; see also 29 C.F.R. 1601.21(e), 1601.76 and 1601.77.[12] And Section 706(f) provides that once these proceedings have been invoked and have failed to resolve the dispute, the claimant may seek a judicial remedy. See 42 U.S.C. 2000e-5(f). Title VII thus "give[s] state agencies an opportunity to redress the evil at which the federal legislation was aimed,

---

[12] Similarly, the EEOC does not give preclusive effect to any administrative decisions of non-FEP state agencies.

and to avoid federal intervention unless its need [is] demonstrated." *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 821 (1980) (footnote omitted). It plainly contemplates that the state agency may have the first opportunity to address employment discrimination claims. However, the statute's provisions for further federal review following a state agency's decision demonstrate that the agency's decision is not entitled to preclusive effect.

Kremer's analysis of the structure and purposes of Title VII provides powerful support for this conclusion. Although the Court did not speak unanimously in applying res judicata principles to state court judgments, the full Court did agree that state administrative decisions are not entitled to preclusive effect.[13] The majority and dissenting opinions each recognized that according res judicata effect to unreviewed state administrative decisions would be antithetical to Title VII's statutory scheme and purposes. See 456 U.S. at 469-470; *id.* at 487 (Blackmun, J., dissenting); *id.* at 511 (Stevens, J., dissenting).

The Court observed that the "congressional directive that the EEOC should give 'substantial weight' to findings made in state proceedings" (456 U.S. at 470) could not be squared with a rule giving those same findings judicially preclusive effect, stating that "EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions."

---

[13] See 456 U.S. at 470 n.7; *id.* at 487 (Blackmun, J., dissenting) ("a state *agency* determination does not preclude a trial *de novo* in federal district court) (emphasis in original); *id.* at 508-509 (Stevens, J., dissenting) ("state agency proceedings will not bar a federal claim under Title VII").

456 U.S. at 470 n.7. The Court concluded that it is not "plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC" (*ibid.*), stating further:

> Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts.

Ibid.[14] Most lower courts, like the court below, have read *Kremer* as providing a bright-line distinction. They have generally concluded that state court judgments resolving employment discrimination claims are entitled to res judicata effect in accordance with state law, while unreviewed state agency determinations will not preclude Title VII claims.[15] This interpretation is both sensible and correct.

---

[14] The Court cited a series of court of appeals decisions in support of its conclusion. *Garner* v. *Giarrusso*, 571 F.2d 1330 (5th Cir. 1978); *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447, 450 n.1 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975); *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972); *Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972).

[15] See, *e.g.*, *Heath* v. *John Morrell & Co.*, 768 F.2d 245, 248 (8th Cir. 1985); *Bottini* v. *Sadore Management Corp.*, 764 F.2d 116, 120 (2d Cir. 1985); *Burney* v. *Polk Community College*, 728 F.2d 1374, 1379-1380 (11th Cir. 1984); *Pizzuto* v. *Perdue Inc.*, 623 F. Supp. 1167, 1174 (D. Del. 1985); *Reedy* v. *State of Florida, Dep't of Education*, 605 F. Supp. 172, 173-174 (N.D. Fla. 1985); *Mitchell* v. *Bendix Corp.*, 603 F. Supp. 920, 922 (N.D. Ind. 1985); *Parker* v. *Danville Metal Stamping Co.*, 603 F. Supp. 182, 188 (C.D. Ill. 1985); *Clinton*

Petitioners largely ignore *Kremer*'s specific discussion of the non-preclusive effect of unreviewed administrative determinations in Title VII adjudications. Instead, they rely on general principles of "administrative res judicata." They maintain (Pet. Br. 25-27) that res judicata principles generally require that federal courts give preclusive effect to *all* state administrative adjudications.

This Court addressed the concept of administrative res judicata in *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966). That case involved the interpretation of a federal government contract's dispute resolution provisions. The Court held that the contract's "disputes clause," which provided for administrative resolution of contract controversies through a federal agency's board of contract appeals, did not provide the exclusive means for resolving all contract disputes; instead, the contractor could seek judicial relief, as permitted by the Tucker Act and Wunderlich Act, in certain circumstances (384 U.S. at 403-418).[16] The Court concluded, however, that

---

v. *Georgia Ports Authority*, 37 Fair Empl. Prac. Cas. (BNA) 593, 594 (S.D. Ga. 1985); see also *Moore* v. *Bonner*, 695 F.2d 799, 801 (4th Cir. 1982) (interpreting *Kremer* in a Section 1983 action); E.E.O.C. Dec. No. 86-4, at 5 (Dec. 6, 1985). But see *Buckhalter* v. *Pepsi-Cola General Bottlers, Inc.*, *supra*; *Parker* v. *National Corporation for Housing Partnerships*, *supra*; *Zywicki* v. *Moxness Products, Inc.*, 37 Fair Empl. Prac. Cas. (BNA) 710, 711 (E.D. Wis. 1985).

[16] The Tucker Act, at that time, gave the Court of Claims jurisdiction over breach of contract actions. See 28 U.S.C. (1964 ed.) 1346(2). The Wunderlich Act accords finality to an agency decision "in a dispute involving a question arising under [a government] contract" unless the decision "is fraudulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." 41 U.S.C. 321.

"[b]oth the disputes clause and the Wunderlich Act categorically state that administrative findings on factual issues relevant to questions arising under the contract shall be final and conclusive on the parties" (384 U.S. at 419 (footnote omitted)). The Court added (*id.* at 420):

> [W]hen the Board of Contract Appeals has made findings relevant to a dispute properly before it and which the parties have agreed shall be final and conclusive, these findings cannot be disregarded and the factual issues tried *de novo* in the Court of Claims when the contractor sues for relief which the board was not empowered to give.

Petitioners suggest (Pet. Br. 25-26) that *Utah Construction* establishes a general rule requiring that federal courts give res judicata effect to all state administrative determinations. Plainly, they read far too much into that decision. *Utah Construction* addressed the res judicata implications of a specific federal agency's factual determinations under a particular statutory regime. While the Court noted that its decision "is harmonious with general principles of collateral estoppel," it specifically stated that "the decision here rests upon the agreement of the parties as modified by the Wunderlich Act." 384 U.S. at 421 (footnote omitted). The Court quite correctly gave the board of contract appeals' findings preclusive effect in light of the parties' contractual agreement to resolve disputes through that agency and the specific command of Congress—through the Wunderlich Act, 41 U.S.C. 321—that the agency's findings would be final.

Utah Construction indicates that in some circumstances the federal court should give preclusive effect

to federal administrative determinations, see 384 U.S. at 422, but it says nothing about application of administrative res judicata to state agency determinations.[17] Furthermore, it indicates that the congres-

[17] The decision whether administrative res judicata is warranted necessarily depends upon the circumstances presented. While petitioners cite (Pet. Br. 26 n.10) a series of cases recognizing the principle of administrative res judicata, none of those decisions support application of that principle in this case. Most of these cases involve questions pertaining to the preclusive effect of federal administrative decisions. *Delamater* v. *Schweiker*, 721 F.2d 50, 53-54 (2d Cir. 1983) (administrative decision to award social security benefits was not binding in subsequent agency adjudication); *United States* v. *Karlen*, 645 F.2d 635, 638 (8th Cir. 1981) (agency determination that an Indian lessee breached lease could have issue preclusive effect in subsequent federal suit seeking damages for lease breach); *Bowen* v. *United States*, 570 F.2d 1311 (7th Cir. 1978) (federal court adjudicating a federal tort claim must give preclusive effect, as a matter of state law, to a federal agency finding that plaintiff violated federal aviation rules); *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588, 603 & n.17 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978) (declining to decide whether an agency must give collateral estoppel effect to its own prior determinations); *McCulloch Interstate Gas Corp.* v. *FPC*, 536 F.2d 910, 913 (10th Cir. 1976) (agency factual determinations are binding in a subsequent agency proceeding); *Painters District Council No. 38* v. *Edgewood Contracting Co.*, 416 F.2d 1081, 1083-1084 (5th Cir. 1969) (agency decision holding that union violated one section of a federal labor relations statute is binding in federal court action seeking damages under another section of the statute); *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804, 810 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969) (agency determination plaintiffs were not engaged in "foreign commerce" under one statute did not bar a federal court from inquiring whether plaintiffs engaged in "foreign commerce" under another statute). The other decisions involved the preclusive effect that state and District of Columbia administrative bodies must accord the decision of another state administrative body. *United Farm Workers* v. *Arizona Agricultural Employment Relations Board*, 669 F.2d 1249, 1255 (9th Cir. 1982) (declining to determine whether a state labor agency's decision is a "judgment" entitled to full faith and credit by another state); *Pettus* v. *American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), cert. denied, 444 U.S. 883 (1979) (holding that a state workmen's compensation agency's determination that employee was unjustified in refusing medical treatment was binding upon a District of Columbia workmen compensation board).

sional intent underlying the particular federal statutory regime at issue is central to the res judicata inquiry. *Id.* at 421 n.18.[18] In *Utah Construction*, the Wunderlich Act supported an inference that preclusion was appropriate in the context of government contract disputes. As *Kremer* demonstrates, the structure and purposes of Title VII support an opposite inference in the context of employment discrimination disputes. 456 U.S. at 469-470; *id.* at 487-489 (Blackmun, J., dissenting); *id.* at 511 (Stevens, J., dissenting).[19]

[18] See also, *e.g.*, *Chandler* v. *Roudebush*, 425 U.S. 840, 861-862 (1976); Restatement (Second) of Judgments § 83(3) and (4) (1982) (administrative res judicata is inappropriate where "the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim" or where application "would be incompatible with a legislative policy"); 4 K. Davis, *Administrative Law Treatise* § 21.5 (1983).

[19] See also, *e.g.*, *Chandler* v. *Roudebush*, 425 U.S. 840, 844-861 (1976); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47-54 (1974); *Rosenfeld* v. *Department of Army*, 769 F.2d 237, 240 (4th Cir. 1985); 4 K. Davis, *supra*, § 21.5, at 62 ("The best example [of a statute embodying a policy against administrative res judicata] may be Title VII."); Catania, *Access to the Federal Courts for Title VII Claimants in the Post-*

Petitioners acknowledge (Pet. Br. 33-34) that Section 706(b) of Title VII instructs the EEOC to give "substantial weight" to final findings and orders of state FEP agencies when reviewing employment discrimination claims. 42 U.S.C. 2000e-5(b). They grudgingly concede (Pet. Br. 34) that Title VII "could be construed" to permit federal de novo review of state administrative decisions. However, they suggest (*ibid.*) that federal courts should nevertheless be required to give preclusive effect to decisions by non-FEP agencies.

Petitioners' position, which finds no support in Title VII precedent, is untenable. This Court, recognizing in *Kremer* that unreviewed state agency decisions are non-preclusive, did not distinguish between FEP and non-FEP agencies. Indeed, the Court supported its conclusion by citing, among other cases, *Garner* v. *Giarrusso*, 571 F.2d 1330 (5th Cir. 1978), a decision denying preclusive effect to a non-FEP agency.[20]

Kremer Era: Keeping the Doors Open, 16 Loy. L.J. 209 (1985); Note, *Res Judicata Effects of State Agency Decisions in Title VII Actions*, 70 Cornell L. Rev. 695 (1985). Notably, while *Kremer* cited *Utah Construction* for the proposition that New York courts could, consistent with due process, give deference to administrative fact-finding, 456 U.S. at 484 n.26, it nowhere suggested that federal courts would be bound by unreviewed state administrative determinations.

[20] The facts in *Garner* are very similar to those in the instant case. The plaintiff, a city employee, had raised charges of racial discrimination before the New Orleans Civil Service Commission. That agency conducted an administrative hearing to assure that the plaintiff "had in fact breached police department regulations and had been dismissed for that reason and not because of racial discrimination." 571 F.2d at 1336. The court, following a careful analysis of administrative res judicata, concluded that the administrative decision was not entitled to preclusive effect. See *id.* at 1335-1338.

Since *Kremer*, other courts of appeals have refused to draw that distinction.[21]

Furthermore, petitioners' position is inconsistent with Title VII's statutory scheme. It would lead to the perverse result that federal courts must give preclusive effect to decisions by non-FEP agencies—which likely have little expertise in employment discrimination matters[22]—while according only "substantial weight" to decisions by the states' expert FEP agencies. Certainly Congress, did not intend that the federal courts, in implementing the important national

---

[21] See *Heath* v. *John Morrell & Co.*, 768 F.2d at 248; *Burney* v. *Polk Community College*, 728 F.2d at 1379-1380. Notably, the lone court of appeals in conflict with the decision below, *Buckhalter* v. *Pepsi-Cola General Bottlers, Inc.*, *supra*, relied on a different theory—apparently abandoned by petitioners—to give preclusive effect to a state agency determination. The court reasoned that administrative res judicata was appropriate because the state agency in that case acted in an "adjudicative," rather than an "investigative" capacity (768 F.2d at 854). That theory, like petitioners' theory, is infirm. It fails to recognize the important policy interests supporting federal de novo review in Title VII actions. In addition, *Kremer*'s statements on the non-preclusive effect of state agency determinations were accompanied by citations to three cases—*Garner*, *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975), and *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972)—that refused to provide preclusive effect to the decisions of adjudicatory agencies.

[22] In this case the non-FEP agency was a state educational institution that was authorized by statute to conduct a hearing in response to a public employee's claim of wrongful discharge. Other non-FEP agencies likely to address employment discrimination claims include state and local civil service commissions (see, *e.g.*, *Garner* v. *Giarrusso*, *supra*) and state unemployment compensation agencies (see, *e.g.*, *Ross* v. *Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985)).

policy of nondiscrimination, would be bound by findings of the various state non-FEP agencies with little or no expertise in employment discrimination matters.

III. This Court Has Previously Denied Res Judicata Effect to Non-Judicial Decisions in Title VII Actions

This Court, recognizing the special role of the federal courts in adjudicating Title VII claims, has repeatedly refused to give res judicata effect to employment discrimination determinations by non-judicial entities. There is no reason to depart from those precedents in this case.

This Court's decision in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), is particularly relevant. The Court concluded that a federal court must provide a de novo adjudication of a federal employee's Title VII claim, notwithstanding the decisions of the Civil Service Commission and the employing agency rejecting the employee's charges.[23] The Court stated (*id.* at 848):

> The legislative history of the 1972 amendments [to Title VII] reinforces the plain meaning of the statute and confirms that Congress intended to accord federal employees the same right to a trial *de novo* as is enjoyed by private-sector employees and employees of state governments and political subdivisions under the amended Civil Rights Act of 1964.

[23] In *Chandler*, a Veterans Administration employee alleging sex and race discrimination received a hearing before the agency's complaints examiner, followed by review within the agency and subsequent review by the Civil Service Commission. 425 U.S. at 842. The hearing was conducted as an adversarial adjudication. See *id.* at 863; see also 74-1599 Pet. App. 1a-17a; 74-1599 J.A. 15-44.

As this passage suggests, Congress intended that all employees, whether federal, state, or private-sector, would be entitled to a trial de novo in federal court despite their exercise of other federal and state administrative remedies. That symmetry, recognized in *Chandler*, should be respected here. Congress plainly did not intend that a federal employee would be entitled to a trial de novo following an unsuccessful administrative adjudication before his employing agency, but a state employee, such as respondent, should be denied a trial de novo based on the res judicata effect of an analogous administrative adjudication before his employing agency.[24]

This Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), reflects a similar principle. The Court concluded that a federal court adjudicating a union employee's Title VII claim should not give preclusive effect to a prior arbitral decision rejecting the discrimination charge.[25] The Court rejected the notion that the employee's pursuit of his collective bargaining agreement remedy represented an election of remedies and waiver of his Title VII claim, noting that "[t]here is no suggestion

[24] Notably, Congress perceived that the "'entrenched discrimination in the Federal Service'" (*Chandler*, 425 U.S. at 841, quoting, H.R. Rep. 92-238, 92d Cong., 1st Sess. 24 (1971)) also existed in the state and local civil service. See H.R. Rep. 92-238, *supra*, at 17-18; S. Rep. 92-415, 92d Cong., 1st Sess. 9-11 (1971).

[25] The employee had filed a grievance under the collective bargaining agreement alleging that he was improperly discharged (415 U.S. at 39), ultimately claiming that his termination was racially motivated (*id.* at 42). The grievance proceeded to arbitration. The arbitrator ruled that the discharge was for "just cause," making no reference to the claim of racial discrimination (*ibid.*).

in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." 415 U.S. at 47. The Court stated that "in general, submission of a claim to one forum does not preclude a later submission to another" (*id.* at 47-48 (footnote omitted)), specifically observing that "[f]or example, Commission action is not barred by the 'findings and orders' of state or local agencies" (*id.* at 48 n.8). The parallels between *Alexander* and the present case are apparent. It would be incongruous if a union employee were entitled to pursue his Title VII remedy in federal court despite an adverse decision under the arbitration provisions of his collective bargaining agreement, but a state employee is precluded from pursuing his Title VII remedy by an adverse decision under state administrative proceedings governing review of discharge decisions. See also *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799 (1973) (holding that an EEOC finding of no reasonable cause does not preclude federal de novo review of a discrimination claim).[26]

In short, this Court has recognized that "Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal stat-

[26] Notably, petitioners rely on arguments similar to the "election of remedies" argument rejected in *Alexander*, suggesting (Pet. Br. 33) that respondent can preserve his Title VII remedy by foregoing his state administrative remedies. As *Alexander* explains, 415 U.S. at 47-54, an employee should not be forced to make that choice. "Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination." H.R. Rep. 92-238, 92d Cong., 1st Sess. 18-19 (1971).

utes." *Alexander*, 415 U.S. at 48 (footnote omitted). That principle is applicable in the present case. Respondent, a state employee, should be free to pursue his state law remedies in the state administrative forum without foreclosing his independent Title VII remedy.

IV. Petitioners' Suggested Policy Rationale for Preclusion Should Not Be Substituted for Title VII's Own Requirements and Policies

Petitioners suggest (Pet. Br. 41-42) various policy considerations favoring application of res judicata to the state administrative determination in this case. However, those considerations, even if valid, are irrelevant. Congress has determined that federal courts adjudicating Title VII claims should not give preclusive effect to judicially unreviewed state administrative decisions. That determination controls the present case. Furthermore, even if the weighing of policy interests were appropriate, they would counsel against giving preclusive effect to judicially unreviewed administrative decisions.

Petitioners suggest that preclusion is necessary to protect the "integrity of the adjudicatory process which the State of Tennessee has provided for the purpose of protecting Fourteenth Amendment interests affected by agency action" (Pet. Br. 41). However, this Court rejected similar arguments made with respect to federal administrative processes (see *Chandler*, 425 U.S. at 863-864) and collective bargaining agreements (see *Alexander*, 415 U.S. at 55-60). Indeed, petitioners' position quite likely would actually hamper the effectiveness of state administrative mechanisms for resolving employment disputes. Claimants, faced with the prospect that an adverse

decision from a state administrative agency would preclude a Title VII claim, might frequently choose to avoid or abandon state proceedings. That result "would undermine Congress' intent to encourage full use of state remedies." *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 65, 66 n.6 (1980); see *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 59; cf. *Moore* v. *Bonner*, 695 F.2d 799, 802 (4th Cir. 1982). That result, in addition, would likely increase the workload of the federal courts and the EEOC, since they would be required to review discrimination claims without the benefit of the prior state agency examination. It also could upset the division of labor between the EEOC and state FEP agencies currently achieved through worksharing arrangements.[27]

Petitioners suggest that nonpreclusion will "burden the federal court with needlessly relitigating an issue already fully litigated" (Pet. Br. 41). However, the legislative history of Title VII suggests that Congress favored judicial resolution of discrimination claims. For example, when Congress amended

[27] The Commission has entered into worksharing agreements, pursuant to Section 709(b) of Title VII, 42 U.S.C. 2000e-8(b), with many of the state FEP agencies that enforce state and local laws. See E.E.O.C. Compl. Man. (CCH) ¶¶ 281, 282 (May 1985); 29 C.F.R. 1601.13, 1601.80 (listing certified deferral agencies). Under these agreements, certain categories of discrimination charges are processed by state authorities; with respect to other categories, the state FEP agency often waives its right under the statute to initiate review and EEOC processes the charge from the outset. When the state agency processes the charges under this arrangement, EEOC generally takes no action "until the [FEP agency] issues its final findings and orders or otherwise terminates its proceedings." E.E.O.C. Compl. Man. (CCH) ¶ 284 (May 1985).

Title VII in 1972, congressmen suggested that judicial resolution of employment discrimination claims might be preferable to EEOC adjudicatory determinations because it would promote public confidence that fair employment laws were being enforced in an independent and even-handed manner. See S. Rep. 92-415, *supra*, at 85 (views of Sen. Dominick); see also *Kremer*, 456 U.S. at 474 n.15.[28] And as the court below noted (Pet. App. A21), "there are significant differences between the state judicial and administrative forums that counsel against federal court deference to the decisions of the latter even though Congress has required deference to the decisions of the former."

In all events, the potential inefficiencies in nonpreclusion are easily exaggerated. Claimants who have lost their discrimination claims after a full hearing are likely to be circumspect in seeking a full-scale federal readjudication. Furthermore, federal court litigation following administrative adjudication generally should be able to be foreshortened. The prior proceedings have typically narrowed the issues, less discovery is likely to be needed, and the federal court is able to consider the administrative record as evidence entitled to appropriate weight. See *Chandler*, 425 U.S. at 863 n.39; cf. *Alexander*, 415 U.S. at 60 n.21.

Finally, we note that *Kremer's* distinction between state courts and state agencies for purposes of Title VII res judicata is straightforward and easy to apply.

[28] Indeed, when Congress first enacted Title VII, congressmen expressed concern regarding the adequacy and effectiveness of state remedies and procedures. See 110 Cong. Rec. 7205 (1964) (Sen. Clark); *id.* at 7214 (Clark-Case interpretive memorandum).

By contrast, any attempt to apply res judicata principles based on the identity or character of the agency will inevitably generate confusion.[29] Difficult questions will arise as to whether a state agency in a given case has acted in an adjudicatory capacity within the meaning of "administrative res judicata" and whether it has applied standards, in reaching its finding, consistent with Title VII. Furthermore, unwary claimants may not receive judicial de novo consideration because they were unaware that entry into an adjudicatory phase of a state system could lead to a binding administrative decision.

In sum, *Kremer*'s bright line distinction between the preclusive effect of state court judgments and the nonpreclusive effect of judicially unreviewed administrative determinations is both legally sound and practicable. The court of appeals correctly determined that the state's administrative determination rejecting respondent's claim of employment discrimination did not preclude respondent's Title VII action.

---

[29] The confusion will be particularly pronounced where federal-state worksharing agreements are in effect. Many claimants' charges are processed to completion by state agencies, rather than the EEOC, simply because the charges were administratively allocated to the state FEP agency by the worksharing agreement.

CONCLUSION

The judgment of the court of appeals, insofar as it declines to accord preclusive effect in respondent's Title VII action to a judicially unreviewed state administrative determination, should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

CAROLYN B. KUHL
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

JOHNNY J. BUTLER
General Counsel (Acting)

GWENDOLYN YOUNG REAMS
Associate General Counsel (Acting)

VELLA M. FINK
Assistant General Counsel

MARK S. FLYNN
Attorney
Equal Employment Opportunity Commission

MARCH 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20168